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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 80

FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN, and Frank White, as Treasurer of the United States, petitioners

v.

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ Rosenthal, et al., etc.

No. 81

BENJAMIN GUINNESS, WALTER T. ROSEN, MORITZ Rosenthal, et al., etc., petitioners

v.

FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN; Frank White, as Treasurer of the United States; and Carl Joerger et al., etc.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF FREDERICK C. HICKS, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES

PREVIOUS DECISIONS IN THESE CASES

The opinion of the Circuit Court of Appeals in this case is reported in 299 Fed. 538. The opinions

of the District Court are reported in 291 Fed. 768 and 291 Fed. 769.

GROUNDS OF THE JURISDICTION OF THIS COURT

These cases have been brought to this Court by writs of certiorari granted on June 9, 1924 (R. 32), to review a judgment of the United States Circuit Court of Appeals for the Second Circuit (R. 27) dated April 21, 1924 (299 Fed. 538), which affirmed a final decree of the District Court of the United States for the Southern District of New York (R. 13) dated July 17, 1923 (291 Fed. 768, 291 Fed. 769). The writ of certiorari in case No. 80 was issued upon the petition of Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, defendants, in the District Court, and in case No. 81, upon the petition of Benjamin Guinness et al., plaintiffs, in the District Court. The writ of certiorari was issued pursuant to Section 240 of the Judicial Code (36 Stat. L. 1157).

The suit in the District Court was instituted by plaintiffs pursuant to the provisions of Section 9 of the Trading with the Enemy Act, as amended, June 5, 1920 (41 Stat. L. 977), to recover out of money and property held by the Alien Property Custodian and the Treasurer of the United States as the property of Delbruck Schickler & Company, enemies, the amount of an indebtedness owing to the plaintiffs by the said enemies. The provisions of the Judicial Code are extended to

the orders and decrees made under the Trading with the Enemy Act by Section 17 of that Act (40 Stat. 425).

STATEMENT OF THE CASE

For many years prior to April 6, 1917, the defendant, Delbruck, Schickler & Company, a German partnership (hereinafter referred to as the German firm) was engaged in transactions with the partnership of Ladenburg, Thalmann & Company, the plaintiffs (hereinafter referred to as the American firm).

On April 6, 1917, the date of the outbreak of war between the United States and Germany, the German firm was indebted to the American firm in the sum of M. 1079.35 as of January 1, 1916, as shown by an account stated, dated December 31, 1916, duly acknowledged by the German firm. There were no dealings between the two firms after December 31, 1916. Against the indebtedness owed by the German firm there was a set-off of $35.35. (R. 9.)

After the approval of the Trading with the Enemy Act there was transferred and paid to the Alien Property Custodian certain money and other property belonging to the German firm and there is now held by the Custodian or the Treasurer of the United States an amount greater than the claim of the American firm.

The American firm instituted a suit under Section 9 of the Trading with the Enemy Act as

amended June 5, 1920 (41 Stat. L. 977), to recover the amount of its indebtedness, with interest from December 31, 1916, out of the money and other property held by the Custodian and the Treasurer of the United States. (R. 9.)

The evidence in the case has been stipulated (R. 8 to 10), and the facts are undisputed. The only questions which the lower Courts were called upon to decide were questions of law, namely, (1) what rate of exchange should the Court adopt in converting the amount of the defendants' indebtedness in marks into money of the United States, and (2) were the plaintiffs entitled to interest upon the indebtedness owing by the German firm during the period between April 6, 1917, and July 14, 1919, the first date being the date of the outbreak of war between the United States and Germany and the second being the date of the issuance of the general license by the War Trade Board permitting communication and commercial transactions between citizens of the United States and citizens of Germany.

The plaintiffs contended that the rate of exchange to be adopted should be the rate existing on the date of the breach of the contract to pay the amount due upon the account stated. The defendants contended that the rate of exchange to be adopted should be the rate existing at the date of the entry of the final decree. The District Court held (R. 11) that the proper rate of exchange was the rate as of the date of the breach of the

contract to pay upon the account stated, dated December 31, 1916, at which time the German mark was worth 18¼ cents (R. 9).

Upon the question as to the running of interest the plaintiffs contended that they were entitled to interest upon their indebtedness for the entire period from December 31, 1916, to March 23, 1923, the date of the hearing. The defendants contended that no interest should be allowed for the period between April 6, 1917, and July 14, 1919. The District Court adopted the contention of the defendants on this point and refused to allow any interests for the period between April 6, 1917, and July 14, 1919. (R. 10.)

From the final decree of the District Court (R. 13) entered in accordance with the Court's opinion upon the questions referred to, the defendants appealed to the Circuit Court of Appeals on the ground that the District Court should have adopted the rate of exchange as of the date of the entry of the final decree. Plaintiffs prosecuted a cross-appeal from the decree of the District Court for its failure to allow interest upon their claims for the period between April 6, 1917, and July 14, 1919.

The Circuit Court of Appeals affirmed the decree of the District Court upon both questions. (R. 21 ff.) Thereupon the defendants filed their petition for writ of certiorari to review so much of the decision of the Circuit Court of Appeals as did not adopt the contention of the defendants

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that the rate of exchange to be used should be the rate existing at the date of the entry of the final decree, and the plaintiffs filed their petition for writ of certiorari to review so much of the decision of the Circuit Court of Appeals as held that they were not entitled to interest upon their claim for the period between April 6, 1917, and July 14, 1919.

Both petitions were granted by this Court, and both questions are therefore before the Court.

QUESTIONS PRESENTED

The questions presented in the case are:

(1) Where a debt is owing to a person in currency of a foreign country and suit is brought in a Court of the United States to recover the amount of the debt, as of what date should the rate of exchange be taken by the Court in converting into money of the United States, for the purpose of entering a decree or judgment, the amount of the debt which is expressed in foreign currency?

(2) May interest be recovered upon a debt owing by a citizen of one belligerent country to a citizen of the other during the period of war?

ARGUMENT

I

The district court in calculating the amount of the German firm's indebtedness in United States money should have adopted the rate of exchange existing at the date of the entry of the final decree

This question arises principally because a Court in the United States can not enter a decree or

judgment in foreign money. *The Edith* (1871), Fed. Cas. No. 4281; *Erlanger* v. *Avengno,* 24 La. Ann. 77; *Bronson* v. *Rodes* (1868), 7 Wall. 229; *Butler* v. *Horwitz,* 7 Wall. 258.

The authorities upon this question can not be said to be uniform. There would seem to be five possible rates of exchange which could be adopted for converting the amount of a debt in foreign currency into currency of the United States: (1) The rate of exchange prevailing at the date the payment should have been made or the cause of action accrued, or (2) the rate of exchange prevailing on the date the suit for recovery of the debt is commenced, or (3) the rate of exchange prevailing on the date the verdict or judgment is entered, or (4) the rate of exchange prevailing on the date the judgment is paid or execution made thereon, or (5) the rate of exchange most favorable to the plaintiff for a reasonable time after the breach of the obligation to pay. See *Columbia Law Review,* vol. 22, page 217.

The second and fourth suggested rates of exchange may be eliminated at once, as most of the authorities do eliminate them. The second suggestion is hardly tenable since the commencement of the suit means nothing more than the submission of the dispute for determination by a properly authorized tribunal, and to have put upon the obligation the official stamp of the State. The fourth suggested rate of exchange can

hardly be adopted, since prior to the date of the payment of the judgment or the execution thereon the old obligation has already been translated at the date of the entry of the judgment into an obligation payable in money of the United States, and the judgment could not have been entered in any other money. Hence, prior to the date of execution, the old obligation had been merged in an obligation payable in currency of the United States.

The fifth suggested rate of exchange seems not to have been adopted in any of the cases, but has been suggested by several writers on the analogy of the measure of damages in an action to recover damages for the conversion of stock in a corporation. The nearest approach to the use of the fifth suggested rate of exchange may be found in the case of *Butler* v. *Merchant*, 27 S. W. (Texas), 193, where the Court used a rate of exchange equivalent to the average between the rate of exchange existing at the date of the breach of the contract and the rate of exchange existing at the date of the institution of the suit. It hardly seems necessary to give the fifth suggested rate of exchange any consideration.

The question then reduces itself to one as to whether the rate of exchange prevailing at the date of the failure to pay or breach of contract should be used or the rate at the date when the verdict or judgment is entered. There would seem to-day to be no distinction between the date of the

verdict and the date of the judgment, as was pointed out by Rowlatt, J., in *Uliendahl* v. *Pankhurst Wright & Co.* (1923), 39 T. L. R. 628:

> The phrase "the rate prevailing at the date of judgment" should really be "the rate prevailing at the date of the verdict"; to-day verdict and judgment usually come together, but in the old practice judgment did not come until the first day of the term following that in which a verdict was obtained, and it was the verdict that was the important matter.

Prior to the Great War, and consequently prior to the time when fluctuations in rate of exchange were so great that persons having obligations payable in German marks would receive almost nothing were they obliged to accept payment of the obligations owing to them in German marks, the authorities were few and were far from satisfactory. This was due in a large measure to the fact that fluctuations in exchange were rare, and such as there were made no material difference. The case of *Taan* v. *LeGaux* (1793), 1 Yeates (Pa.), 204, seems to be the earliest decision of an American Court upon the subject. This case held that the rate of exchange to be used was the rate existing at the date of the judgment. The earliest Federal case seems to be that of *Smith* v. *Shaw* (1808), 2 Wash. C. C. 167 (Fed. Cas. No. 13170), which also held that the rate of exchange existing at the date of the judgment was the proper rate.

None of the early opinions contain much reasoning as to why a particular rate of exchange should be adopted under such circumstances.

Although the question was not one of great importance in the earlier cases, it had protruded itself enough to cause comment by one of the great text writers of the Nineteenth Century. Justice Story in his "Conflict of Laws," seventh edition, Section 308, in commenting upon the principle laid down in the case of *Lee* v. *Wilcocks,* 5 Sergeant & Rawle (Pa.), 48, says:

> In a late American case, where the payment was to be in Turkish piastres, but it does not appear from the report where the contract was made or was made payable, it was held to be the settled rule "where money is the object of the suit to fix the value according to the rate of exchange at the time of the trial." It is impossible to say that a rule laid down in such general terms ought to be deemed of universal application, and cases may easily be imagined which may justly form exceptions.

In the case of *Grant et al.* v. *Healey* (1839), Fed. Cas. No. 5696, which was decided by Mr. Justice Story, the learned text writer apparently adopted the rate of exchange prevailing at the date of judgment. In that case he said:

> * * * I take the general doctrine to be clear that whenever a debt is made payable in one country, and it is afterwards sued for in another country, the creditor is

> entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, *with interest for the delay;* for then, and then only, is he fully indemnified for the violation of the contract. In every such case the plaintiff is therefore entitled to have the debt due to him first ascertained at the par of exchange between the two countries and then to have the rate of exchange between those countries added to or subtracted from the amount, as the case may require, in order to replace the money in the country where it ought to be paid. It seems to me that this doctrine is founded on the true principles of reciprocal justice. (Italics ours.)

Justice Story goes on the assumption in this case that the creditor of a foreign debtor is to be compensated for the delay in the payment of the obligation not by having imposed upon the debtor a new obligation to pay something he did not agree to pay but by having awarded to him interest for the period of the delay. See also *Cropper* v. *Nelson,* Fed. Cas. No. 3417; *Smith* v. *Shaw,* Fed. Cas. No. 13170.

Perhaps the leading case upon the subject prior to the time when the question as to rate of exchange became acute was a case decided by the Supreme Court of Wisconsin, *Hawes* v. *Woolcock,* 26 Wis. 629. In that case the court said:

> Perhaps a strict application of logical reasoning to the question would lead to the

result that the premium should be estimated at the rate when the note fell due. That was when the money should have been paid and when the default in performing the contract occurred. This conclusion would be supported by the analogy derived from the rule of damages on contracts to deliver specific articles, fixing the market price at the time when they ought to have been delivered as the criterion. This rule might sometimes be to the advantage of the holder of the note, as in the present case. In other cases where the premium was less at the time the note became due than at the time of trial, it would be to his detriment. And in view of these uncertainties and fluctuations in the rate, upon grounds of policy as well as for its tendency to do as complete justice between the parties as is possible, we have come to the conclusion that the true rule in such cases is to give judgment for such an amount as will, at the time of the judgment, purchase the amount due on the note in the funds or currency in which it is payable. To accomplish this, of course, the premium should be estimated at the rate prevailing at the time of trial. By this rule the holder would neither gain nor lose by the fluctuations in the rate, but whenever he obtained a judgment would obtain it for a sum which would then procure him the exact amount to which he was entitled in the proper currency. This does complete justice between the parties, and seems, therefore, to indicate the true ex-

tent to which the difference of exchange in such cases should affect the amount of recovery.

See *Lee* v. *Wilcocks,* 5 Sergeant & Rawle 48; *Robinson* v. *Hall,* 28 How. Prac. 342. In *Scott* v. *Hornsby,* 1 Call. (Va.) 35, the Court said:

> As to the other point (i. e., the rate of exchange) the sterling money was properly settled at the time of the judgment, because the rate of exchange was liable to fluctuation and therefore should be ascertained at the time when the plaintiff is to get his money.

See also *Comstock* v. *Smith,* 20 Mich. 338; *Murphy* v. *Camac,* Fed. Cas. No. 9948; *The Blohm* (1867) Fed. Cas. No. 1556; *Marbury* v. *Marbury* (1866), 26 Md. 8; *Hargrave* v. *Creighton* (1873), 1 Woods. 489 (Fed. Cas. No. 6064); *Capron* v. *Adams* (1868), 28 Md. 529; *Benners* v. *Clemens* (1868), 58 Pa. 24.

In the case of *Comstock* v. *Smith, supra,* where a contract, conditioned upon the payment in foreign money in a foreign country, was broken and suit brought in a Court in the United States, the Court charged the jury that if the plaintiff was entitled to recover upon the proofs in the case for breach of the contract declared upon, it being payable in lawful money of Canada, the plaintiff was entitled to recover the *present* value of Canadian currency as compared with legal tender notes of the United States; that is, that she was en-

titled to the premium which Canadian money was then worth over United States legal tender notes. The appellate court held that there was no error in this charge.

The foregoing cases, discussed and cited, either directly or inferentially hold that the proper rate of exchange to be adopted in converting the amount owing in foreign currency into money of the United States for the purpose of the entry of judgment is the rate of exchange existing at the date of judgment. These cases seem to represent the weight of authority in the American courts upon the subject prior to the Great War.

There were American cases, however, decided prior to the war which seem to take a contrary view. Amongst these are: *Spreckles* v. *The Weatherly* (1981), 48 Fed. 734; *Forbes* v. *Murray* (1869), 3 Ben. 497 (Fed. Cas. No. 4928); *Grunwald* v. *Freese* (1893), 34 Pac. (Calif.) 73; *McKiel* v. *Porter* (1842), 4 Ark. 534; *Hussey* v. *Farlow* (1864), 91 Mass. 263; *Stringer* v. *Coombs* (1873), 62 Me. 160; *Jelison* v. *Lee*, 3 Woodb. & M. 368.

Many of the pre-war cases on both sides of this question are unsatisfactory, and many of them can only be said to favor one or the other rule argumentatively.

The text writers, in so far as they adopt any rule, adopt the rule that the proper rate of exchange is the rate existing at the date of the trial or at the date of the actual payment of the money

Section 213 of Sutherland on Damages, 4th edition (1916), states:

> *Rate of Exchange.*—Where the debt is not only payable in the currency of a foreign country but is expressly or by implication also payable there, and not having been paid is sued in this country, the creditor is entitled to the money of the forum to a sum equal to the value of the debt at the place where it should have been paid. Where the creditor sues, the law ought to give him just as much as he would have had if the contract had been performed, just what he must pay to remit the amount of the debt to the country where it was payable. Hence he is entitled to recover according to the rate of exchange between the two countries at the time of the trial.

See also Section 274, Sedgwick on Damages, 9th edition (1912). Sedgwick is not altogether clear as to what he thinks is the proper rule, but he does seem to adopt the rule which holds that rate of exchange existing at the date of judgment is the proper one. The authority cited by Sedgwick for his general rule is *Marbury* v. *Marbury*, 26 Md. 8, which is a leading case for the judgment day rule.

It would seem, therefore, that prior to the Great War the weight of authority in the United States was that the rate of exchange prevailing at the time of judgment was the proper one to be adopted in calculating the amount of a judgment in United States money where the obligation sued upon was payable in foreign money.

The earlier English decisions seem to be as much confused as the American. The earliest case which has been found which could possibly have any bearing upon the subject is that of *Elkins* v. *East India Company* (1717), 1 P. Williams, 395. The words and expressions used in this case are somewhat ambiguous and might well be the subject of argument, but it seems fair to say that the Court in deciding the case adopted the rate of exchange existing at the time of the judgment. The money was owing and payable in the East Indies, and suit was brought in England. The entire judgment reads as follows:

> Let the master see what was the interest on money during these years in the Indies and what is the charge of returning money from the Indies to England, and he is to allow Indian interest, deducting out of it the charge of returning.

The use of the present tense by the court when it says that the master is to ascertain what *is* the charge of returning money from the Indies to England would seem to mean the charge at the time judgment was entered.

The case of *Scott* v. *Bevan* (1831), 2 Barnwall & Adolphus, 78, has been frequently cited as authority for both rules. The decision is somewhat confused in view of the fact that suit was instituted in England upon a judgment obtained in Jamaica, and it is not altogether clear in the case when the words "date of judgment" are used with respect

to the question of the rate of exchange, whether the date of the judgment in Jamaica is referred to, which, of course, would be the date of the breach, or whether the date of the judgment then being rendered in the English Court is referred to.

The case of *Delegal* v. *Naylor* (1831), 7 Bing. 460, decided the same year as *Scott* v. *Bevan, supra,* although not entirely clear, seems to adopt the rate of exchange existing at the date of judgment. The old case of *Cash* v. *Kennion* (1805), 11 Vesey 314, like *Scott* v. *Bevan,* has been cited by the proponents of both rules. The case, as a matter of fact, is of little assistance upon the present question to anyone.

Coming down to more recent decisions, the last English case upon the subject prior to the very recent cases, which will be discussed presently, was the case of *Manners* v. *Pearson* (1898), 1 Ch. Div. 581. In view of the fact that the Manners case, in its proper interpretation, clearly lays down the rule that the rate of exchange prevalent at the date of judgment is to be adopted under circumstances such as the present, and in view of the still further fact that the English courts, including the House of Lords, have been at great pains in their endeavors to distinguish the Manners case from recent cases in which they have decided contrary to the Manners case, it will be interesting to examine that case somewhat carefully.

In the Manners case the decision was by a court divided two to one. The recent English cases have referred more to the opinion of the minority Judge, Vaughn Williams, than to the majority opinion. This is due to the fact that the English courts in the recent English cases have not desired to follow the majority opinion, but have hesitated flatly to overrule it. That case was an action for a breach of contract to pay for labor. The contract, dated October 6, 1891, was entered into in Mexico between the plaintiff's deceased and the defendants. The plaintiff's deceased signed the contract in Mexico and the defendants in London. By it the defendants agreed to pay the deceased (1) the sum of £595 17s. 6d., in English money, on the execution of the agreement, and (2) one cent in Mexican currency for every cubic meter of certain excavation works mentioned in the agreement, which money was payable from time to time as and when the same should be received by the defendants from the Junta or Committee of Management of the drainage works of the city and valley of Mexico. The sum to be paid upon the execution of the contract was duly paid. The sums, however, provided for under the second portion of the contract were not paid.

On June 11, 1896, the personal representative of the deceased brought an action for account. The action did not come on for trial until November 4, 1897. The defendants kept their accounts in

Mexican dollars. On November 13, 1897, in order to avoid having the account taken in chambers, the defendants delivered an account showing that a balance of $19,366 in Mexican currency was due on August 31, 1896, to the estate represented by the plaintiff, which sum they offered to pay in dollars on November 13, 1897. The plaintiff in the case contended that the balance due on the account ought to be turned into English money on August 31, 1896, when the account was completed. At that date the Mexican dollar was worth 2s. 6d. The defendants, on the other hand, contended that the balance ought to be turned into English money on November 13, 1897, when the actual amount was first ascertained and when the dollar was worth only 1s. 6¼d. The court found in favor of the contention of the defendants, and this was affirmed on appeal.

It has been repeatedly sought by those who disfavor the use of the rate of exchange prevailing at the date of judgment to distinguish this case on many grounds, the principal ground being that of procedure. However, the case stands for the proposition that where amounts of money are due in foreign currency at a specific time and are not paid, and later the court enters judgment for all these various amounts, the rate of exchange adopted will be the rate as of the entry of the judgment. These are the facts and the decision in the case, and therefore the case must stand for the proposition that, regardless of the date of

breach, the rate of exchange prevailing at the date of judgment should be adopted.

The recent American decisions are not in accord upon this question. There are a number of decisions holding that the proper rate of exchange to adopt under circumstances such as the present is the rate at the date of judgment or decree. There are others which hold that the rate as of the date of the breach of contract or the date the cause of action accrued is the proper rate. In the latter cases the decisions are for the most part a result of following the case of *Owners of S. S. Celia* v. *Owners of S. S. Volturno,* 1921, L. R. 2 App. Cas. 544, decided by the House of Lords, and which was a case sounding in tort. This case will be discussed later.

In *The Hurona,* 268 Fed. 910, decided in the District Court of the United States for the Southern District of New York by Judge Augustus N. Hand on April 3, 1920, where certain advances had been made to the master of a vessel amounting to 119,077.65 francs between July 3 and July 12, 1919, the court held that in a proceeding instituted in rem to recover the amount of the advances the rate of exchange prevailing at the date of the entering of the decree should be adopted. The court in reaching its decision cited the case of *Grant* v. *Healey, supra,* and *Hawes* v. *Woolcock, supra.*

On the same day in the same court the same judge handed down a decision in the case of *The*

Verdi, 268 Fed. 908, where the suit was to recover damages for a collision off quarantine anchorage, Staten Island, New York, on September 21, 1915. The vessels were each British owned. The temporary repairs and expenses in New York were $1,509. The permanent repairs and expenses were incurred in England, and were paid for there on or about January 1, 1915, in British currency, amounting to £1,791.2.6. The demurrage in New York and England occasioned by the collision amounted to £6,478.0.9. The Commissioner converted these sums into American dollars at $4.74 per pound sterling, the rate of exchange on January 1, 1916, the date upon which it was apparently assumed by the parties that all the damages were ascertainable. Judge Hand in deciding the case had before him the correctness of the commissioner's ruling as to the rate of exchange. The question was whether the rate of exchange should be the rate determined by the commissioner or the rate at the time of the entry of the decree. Judge Hand confirmed the commissioner's report, and in so doing said:

> It is contended that the damages can not be determined until final decree because the action sounds in tort, and that the rate of exchange then prevailing should therefore be adopted. This somewhat archaic argument, if pushed to an extreme, would bar interest prior to the date of the decree. The parties, however, have selected January 1, 1916, as the date to fix the amount

> of their damages in pounds sterling. The case is not one of transmitting these pounds sterling to New York but of finding their equivalent in dollars on January 1, 1916. This can only be done by employing the rate of exchange prevalent at that date. The matter is quite different from one of a continuing obligation to pay pounds sterling in England, the failure to perform which would be compensated for by interest. Here the obligation was to pay dollars in New York. Failure to pay them is similarly compensated for by interest, but as the initial damages were calculated in pounds they must be converted into dollars at the value the pounds had at the time and place of payment. That is measured by the rate of exchange then prevailing.

These two cases, being decided by the same court on the same date, are interesting in that the court reaches one conclusion in the case where damages in tort are sought to be recovered and another conclusion in a case in which it is sought to recover the amount of a debt. Judge Hand, with one exception, is the first judge to recognize the distinction in such cases as these between actions in tort and actions for the payment of debts, and it is because of the failure of the courts to recognize these distinctions and an apparent desire to prevent loss by persons who have dealt in foreign currency, which has depreciated, that has led the courts astray.

In the case of *Page* v. *Levenson et al.,* 281 Fed. 555, decided by Judge Rose in May, 1922, in the United States District Court for the District of Maryland, it was held that the rate of exchange to be used in calculating an amount due in French currency is the rate prevailing at the time of breach of contract. Judge Rose based his decision largely upon the decision of the House of Lords in the case of *S. S. Celia* v. *S. S. Volturno, supra.* That the Judge himself recognized the difficulties involved and that it was practically an impossibility to answer the contentions contrary to the court's opinion is shown by the following passage:

> To avoid such possibilities it has sometimes been suggested that the date at which the foreign money should be valued is that at which suit was brought. Moreover, it is forcibly urged that the only reason why the courts do not give the plaintiff precisely what belongs to him is that they lack the power to enter a judgment in any currency except their own. If they could give him a judgment in francs, marks, lire, or rubles, they would do so. Why not, then, enter up for him one for so many pounds or dollars as will, on the day the judgment is rendered, buy for him the precise number of francs, marks, lire, or rubles to which he is admittedly entitled? Probably no altogether satisfactory answer can be given to this argument, except, perhaps, that in actual practice greater hardship may be inflicted by fixing the date of trial as that upon which the

> conversion of the currency should be made, as when, in the case already cited, it was held that the English debtor had the right, by tendering Soviet rubles, to redeem its bonds held by a third party as security for the repayment of the gold rubles once lent it.

The decision in the Page case is of little assistance in a discussion of the proposition involved. In *Liberty National Bank of New York* v. *Burr*, in the District Court of the United States for the Eastern District of Pennsylvania, 270 Fed. 251, an action was brought at law in assumpsit, and the question came up on a rule for want of a sufficient affidavit of defense. The suit was on a bill of exchange drawn and accepted in London, and made payable there in pounds sterling. It was held that leave to the plaintiff would be granted to move for judgment on a sum based on the rate of exchange prevailing at the time judgment was entered. Amongst other things, the court said:

> This controversy suggests many academically interesting questions and raises some of great practical importance.
>
> The history of any such transaction discloses several different dates, beginning with the date of the promise and including that of maturity, demand, action brought, and the date of trial. The adjudged cases deal with transactions which are unlike in some features. These unlike features may

affect the place of payment, a promise expressed in our own or a foreign money of account, or other points of difference. There are at least hints of distinction based upon the form and nature of the promise in respect to whether it takes the form of a promissory note or the acceptance of a bill of exchange. There are cases also of a promise to pay in a currency, which is what is called depreciated at the time of the making of the promise, or is such at a later date. There are also cases which are sui generis, such as the Confederate money cases.

The English cases must be read with the thought in mind that they are considered from the viewpoint of the fixed idea of the absolute stability of the pound sterling, and that it is an unvarying standard of value. * * *

The Pennsylvania cases supply us with a very meager discussion of the principles on which the rulings may rest. *Lee* v. *Wilcocks,* 5 Serg. & R. (Pa.) 48, is ruled on the ipse dixit of Chief Justice Gibson that, in cases of promise to pay in foreign money, it was the settled rule to base a finding of the sum recovered upon the rate of exchange prevailing at the trial. * * *

Counsel have cited a number of other cases ruled in different jurisdictions. These we have had no opportunity to examine. There would seem, however, to be a lack of uniformity among them. We are, in consequence, taken back to *Lee* v. *Wilcocks,*

> as the only light judicially shed upon the question. It is to be regretted that we have no statement from Chief Justice Gibson of the principle upon what the (*sic*) terms the " settled rule " is based. * * *
>
> After discussing four possible principles * * * we follow the rule laid down in *Lee* v. *Wilcocks,* which we accept as the established rule in Pennsylvania. It meets the test applied in some of the cases in other jurisdictions that the amount of the judgment entered should be the equivalent of what the plaintiff would recover if the suit was brought in the jurisdiction in which the obligation was assumed and in which it was payable. * * *

In the case of *Saigon Maru* (1920), 267 Fed. 881, the rate of exchange existing at the time of the final decree was adopted in converting a claim for damages in foreign currency into currency of the United States.

New York has adopted the breach date rule. In *Hoppe* v. *The Russo-Asiatic Bank,* 200 App. Div. 460, aff. 235 N. Y. 37, the Court of Appeals of New York said:

> In an action properly brought in the courts of this State by a citizen or an alien to recover damages, liquidated or unliquidated, for the breach of contract or for a tort where primarily the plaintiff is entitled to recover a sum expressed in foreign money in determining the amount of the judgment expressed in our currency, the rate of ex-

> change prevailing at the date of the breach of contract or at the date of the commitment of the tort is, under ordinary circumstances, to be applied.

The New York Courts were not, however, in ac-
:ord upon the subject until the decision of the
Court of Appeals. See *Gross* v. *Mendel*, 171 App.
Div. 237; *Sirie* v. *Godfrey*, 196 App. Div. 529;
Revillon v. *Demme*, 114 Misc. 1.

The English courts, since the outbreak of the
Great War, have finally adopted the rule that the
rate of exchange existing at the date of the breach
of the contract to pay or the commission of the
ort, is the proper rate to be used in computing in the
noney of the forum the amount of a debt or tort
n foreign currency. The English courts did not
rrive at this conclusion, however, immediately.
n the case of *Kirsch & Co.* v. *Allen* (1919), 36
'. L. R. 59, the Court adopted the rate of exchange
xisting on the day of judgment. (This case was
eversed on other grounds.) However, the
nglish courts soon abandoned this rule. The
ase which is most often cited as representing
he authority in England is a decision of the
Iouse of Lords, namely, the *Owners of the S. S.*
'elia vs. *Owners of the S. S. Volturno* (1921),
. R. 2 App. Cas. 544. In that case the action
rose out of a collision which occurred in the Medi-
rranean Sea between the English steamship *Celia*
nd the Italian steamship *Volturno*. The trial
ourt held both ships equally to blame and re-

ferred the question of damages to the registrar. The cross-claims for damages were agreed, subject to a question with respect to the rate of exchange raised by the owners of the *Volturno* as to one item of their claim which was expressed in lire. The question was whether in calculating the amount which the respondents, the owners of the *Volturno,* were entitled to recover from the appellants, the owners of the *Celia,* in respect to damages for the use of their vessel, the rate of exchange to be taken should be that existing at the time the loss was incurred or at the time of the assessment or payment. The trial court held that the rate of exchange in respect of the claims for detention should be fixed as at the periods of detention. This was affirmed by the Court of Appeal and upon appeal to the House of Lords the appeal was dismissed, four of the justices holding in favor of the rule that the rate should be fixed as of the periods of detention and one justice dissenting.

It is to be noted that this was an action sounding in tort and may well be distinguishable from actions for the payment of simple debts. It is submitted, however, that, regardless of the majority opinion, Lord Carson, in his dissenting opinion, had all reason in his favor. He said:

> I am, therefore, of opinion that the contention of the appellants is well founded and that the true rule ought to be that the foreigner should, when the damages as assessed or agreed upon are in foreign cur-

rency, receive under the judgment neither more nor less than that sum, and that the proper date to ascertain this is when the entry of judgment is being made for the purpose of making the judgment available.

It may be said that where the rate of exchange has gone against the lira the delay has prejudiced the applicant. I do not think that can be considered, as the rule which has been applied must plainly apply whether the exchange is adverse or otherwise. But in any event to assign this as a reason for the rule would be in reality to give damages for nonpayment, which, except under special circumstances, are never awarded in our courts. (For instance, see the judgment of Bailhache, J., in *Barry* v. *Van den Hurk* (1).)

In *Manners* v. *Pearson* (2), Lindley, M. R., says:

"To substitute English money for Mexican dollars every time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for every breach of it which the plaintiff can prove that the defendants committed, which is a totally different matter.

"I have examined the judgments delivered by the Court of Appeal in *Di Ferdinando* v. *Simon, Smits & Co.* (3), and also the judgments in *Lebeaupin* v. *Crispin & Co.* (4) and in *Barry* v. *Van den Hurk* (1), all decided in 1920, but although they all seem to

me to lay down and assert the same rule as that upon which Hill, J., following some of these judgments, acted and which I have already considered. I do not think the learned judges who decided them rest their judgments on any authorities, but rather assume that such a rule existed, or ought, as a matter of principle, to exist. The only case apart from the recent authorities to which I have referred which seems to me to give us any assistance is the case of *Manners* v. *Pearson* (2), from which I have already quoted."

See also *Lebeaupin* v. *Crispin & Co.* (1920), 2 K. B. D. 714; *Di Ferdinando* v. *Simon, Smits & Co.* (1920), 3 K. B. D. 409; *Société des Hotels du Touquet-Paris-Plage* v. *Cummings* (1921), L. R. 3 K. B. D. 459; *in re British American Continental Bank Ltd. Goldzichr & Pinso's Claim* (1922), 2 Ch. 575; *Uliendahl* v. *Pankhurst Wright & Co.* (1923), 39 T. L. R. 628; *Barry et al.* v. *Van den Hurk* (1920), 36 T. L. R. 663.

The following American cases, besides the ones already cited, adopt the breach date rule: *Simonoff* v. *Bank* (1917), 279 Ill. 248; *Rasst* v. *Morris* (1919), 135 Md. 243; *Katcher* v. *American Express Co.* (1920), 94 N. J. Law 165; *Wormser* v. *Marroquin,* 249 Fed. 428; *Dante* v. *Miniggio* (1924), 298 Fed. 845; *Wichita Mill & Elevator Co.* v. *Naamlooze, etc.,* 3 Fed. (2d) 931.

This Court has not passed upon the question of the rate of exchange raised in this case. The

nearest approach to a consideration of the question by this Court is found in the case of *Birge-Forbes Company* v. *Heye,* 251 U. S. 317. In this case the amount of the claim was expressed in marks, and the question seems to have arisen as to the method of computing the value of the marks in currency of the United States. However, there was no evidence as to the value of the mark at any particular time. There being no such evidence, this Court held:

> The same is true with regard to the taking of the value of the German mark at par value in the absence of evidence that it had depreciated at the time of the plaintiff's payments.

It will be apparent from this that the Court did not have before it the question of the rate of exchange to be adopted where it appeared in the evidence that the foreign currency in which the claim of the plaintiff was expressed had depreciated.

It will, of course, be apparent from an examination of the cases cited above, which have been decided since the outbreak of the Great War, that the decided weight of authority is in favor of the rule that the rate of exchange existing at the date of the breach of the contract is the proper one. On the other hand, it would seem, in so far as the cases prior to the war are helpful, that the rule prior to that time was that rate of exchange prevalent at the date of judgment is the correct one.

And it is interesting to note that some of the old cases which adopt the latter rule gave the same reason for adopting it as do many of the modern cases for adopting the former, namely, that the plaintiff should not be penalized for the failure of the defendant to pay his obligation, the situation being in the older cases that it was more advantageous to the plaintiff to have the rate of exchange existing at the time of judgment used, whereas in the modern cases the contrary is true, it being more advantageous to the plaintiff to have the rate existing at the time of the breach of obligation used. There must be a correct rule based upon reasoning which will be applicable under all circumstances.

The only thorough discussion of the subject is by Edward Gluck in an article in 22 Columbia Law Review, on page 217, entitled "The Rate of Exchange in the Law of Damages." The author is a proponent of the modern theory. He endeavors to justify his theory upon the general rule of damages relative to breach of contract by a seller to deliver goods. He likens the marks which are to be paid under a contract to commodities which are to be delivered pursuant to contract, and from this analogy he draws the conclusion that where there is a breach of contract to pay an obligation owing in marks, the value of the marks as of the date of the breach of the contract to pay should be adopted in converting marks into money of the United States.

This, however, is not an application of the general rule of damages. The general rule of damages is that the amount which the plaintiff will recover in an action against the seller for failure to deliver goods will be the difference between the contract price and the market price at the time of the breach.

In a suit to recover the amount of an obligation owing in marks or any other foreign currency, the plaintiff is not suing to recover loss he has incurred by reason of the failure of the defendant to deliver a commodity, and it is perfectly apparent that the general rule of damages will not apply for the very reason that there is no contract price of the marks to be delivered. Hence, the difference between the contract price of the so-called commodity and the market price can not be found. As a matter of fact the parties did not make their contract with a view to treating the currency dealt with in the contract as a commodity. The parties intended the foreign currency to be treated as money.

There may be much reason in a suit to recover damages for tort injuries where the amount of the damages is expressed in foreign currency, to adopt the rate of exchange existing at the date of the commission of the tort, as the proper rate, since in such instances the Court is endeavoring to secure the payment to the plaintiff of compensation for the injuries done. In the case of a breach of contract to pay money the situation is somewhat

different. While it may be true, as the learned judge of the District Court stated, that in the case of a breach of contract to pay money a new right, namely, the right of damages, is created by the breach of contract, and it is not a question of enforcing the payment provided for in the contract, it is also quite true that while there may be a right of action for damages under such circumstances, the damages to be recovered are merely nominal. Chitty in his Treatise on Pleading, 16th edition, vol. 1, page 121, says with respect to the action of debt:

> This action is so called because it is in legal consideration for the recovery of a *debt eo nomine* and *in numero;* and though *damages* are in general awarded for the detention of the debt, yet in most instances they are merely nominal and are not, as in assumpsit and convenant, the principal object of the suit; and though this distinction may now be considered as merely technical, where the contract on which the action is founded is for the payment of money, yet in many instances we shall find it material to be attended to.

The only recompense which the law recognizes for failure to pay the amount of a debt is the payment of interest. When the parties made their contract they contracted with respect to a specific currency. The mere fact that a court in the United States, for reasons of policy, can not give judgment in a foreign currency should not

affect the fundamental nature of the obligation of the defendant. The obligation of the defendant is to pay marks; and although he may have committed a breach of contract for failure to pay the marks on the date they were due, the right of action which accrued is in its nature a right of action to recover damages expressed in marks, and while there may be damages for failure to pay, these damages, as Chitty remarks, are merely nominal.

The right of action to recover marks continues on down to the very time that the judgment is to be entered. The court in the trial of the action must find first how many marks are due as a result of the breach of contract. The court, in the very nature of things, must consider the action as an action to recover marks, and it is impossible to arrive at a result without taking into consideration the number of marks that are due. When the court proceeds to enter judgment it should then consider the subject as if the defendant were about to pay his obligation, which payment would be made in marks, and the value of those marks as of that moment in American money is the amount the plaintiffs should recover in American money.

To adopt any other theory is to say that when a person who owes an obligation in marks breaks his contract to pay the marks there arises against him a right of action by the plaintiff in dollars, in the event that the defendant is dealing with a

citizen of the United States. There would seem to be just as much logic to say that a right of action to recover damages in any other currency arose, judged by the citizenship of the putative plaintiff.

It would, therefore, seem that the older rule, namely, that the rate of exchange as of the date of the judgment should be used in making such a computation, is the correct rule on strict reasoning. This would be adopting the rule laid down in *Grant* v. *Healey, supra,* and *Hawes* v. *Wilcocks, supra,* and would be in accord with the well-reasoned dissenting opinion of Lord Carson in the case of *S. S. Celia* v. *S. S. Volturno, supra.* The modern cases for the most part do not express clear reasons for adopting the breach-day rule, and, as has been noted, the reasoning laid down in the only recent article on the subject will not stand if pushed to its logical conclusion.

The better text writers also adopt the rate of exchange existing at the date of trial or judgment.

For comments upon the subject see notes in the following publications:

29 Harvard Law Review, 873.
34 Harvard Law Review, 422 and 435.
20 Columbia Law Review, 914 and 922.
31 Yale Law Journal, 198.
19 Michigan Law Review, 652.
68 Pennsylvania Law Review (59 American Law Register), 395.
37 Law Quarterly Review, 38.

II

The plaintiffs are not entitled to recover interest upon their debt for the period between April 6, 1917, and July 14, 1919

The common law as to the suspension of interest upon obligations existing between citizens of hostile belligerent countries is clear. The common law is that interest upon such obligations is suspended during the period of war. The leading case bearing out this proposition is that of *Brown* v. *Hiatts,* 82 U. S. 177. The reason for this rule is that communication between citizens of hostile belligerent countries having become illegal it becomes legally impossible for the debtor to pay his debt or the creditor to receive it, and since interest is charged for the withholding of payment of a debt it would be inequitable to make the charge when it is legally impossible to pay the debt. Some of the cases decided under the common law seem to ingraft upon the general principle an exception, namely, that when a debt does not mature and would not be payable even though war were not in existence, the interest runs until the date of maturity even though war exists between the countries of the parties concerned. It is of interest to note, however, that the court in *Brown* v. *Hiatts, supra,* sets forth this exception to the general rule, and although in that case the indebtedness sued upon was an obligation which did not mature until thirty days after the Civil War began, the Court held that interest was suspended from the begin-

ning of the war. The decision of the Court, therefore, was directly contrary to the expressions of opinion given by it. It may safely be said, however, that the general rule is that upon all ordinary current indebtednesses interest is suspended from the date of the outbreak of war. *Hoare* v. *Allen*, 2 Dallas, 102; *Jackson Insurance Co.* v. *Stewart*, 1 Hughes, 310; *Mayer* v. *Reed*, 37 Ga. 482; *Roberts, Adm.*, v. *Cocks*, 28 Gratt. 207; *Biglar* v. *Waller*, Chase, 316.

This being the rule of the common law, it then becomes necessary to ascertain whether or not the provisions of the Trading with the Enemy Act have materially changed this rule of law. The reason the common law refuses to permit interest to run upon an obligation owing by a citizen of one belligerent country to a citizen of the other is because it is impossible for the debtor legally to discharge his obligation, and it would therefore be inequitable to charge him interest for failure to pay. Unless the Trading with the Enemy Act makes it possible for a German debtor of an American creditor legally to pay his obligation, then the common-law rule has not been changed by the Act.

The only provision in the Trading with the Enemy Act which permits the discharge of a debt owing by an enemy to a citizen of the United States is the provision of Section 9 of the Act which permits the filing of a claim by the creditor and the collection of the obligation out of property

of the enemy seized by the Alien Property Custodian. The creditor, however, under these circumstances may collect his debt only in the event that the particular German has property in the United States which has been seized by the Alien Property Custodian. It is conceivable that there are hundreds of German debtors who had no property in the United States subject to seizure. Still, even where Germans had property in the United States subject to seizure, whether or not it would be seized was discretionary with the Alien Property Custodian, acting for the President.

Unless the common-law rule is adhered to in all cases, to permit interest to run during the period of the war on debts which are collected pursuant to Section 9 of the Trading with the Enemy Act would be to adopt one rule as to interest where a particular German debtor had property in the United States which had been seized and to adopt another rule in those cases where a German debtor had no property in the United States which was subject to seizure.

If the conclusions reached above are sound, then the question arises as to the period for which interest does not run. As indicated above, the reason for the rule is that it is illegal for the debtor to pay his debt to the enemy and illegal for the creditor to receive it. There is no question but that the date when the interest stopped running

was April 6, 1917, when war was declared between the United States and Germany.

Peace was not declared until July 2, 1921. However, on July 14, 1919, the War Trade Board issued a general license permitting trade with Germany. It then became legal for debtors and creditors of the two countries to settle their obligations. It might well be said that this is the last date upon which interest did not run, because of the fact that thereafter it became legal to pay debts and to receive the payment, and the reason for the rule in *Brown* v. *Hiatts* does not apply.

In the case of *Miller* v. *Robertson,* 266 U. S. 243, which was a suit under Section 9 of the Trading with the Enemy Act to recover an indebtedness, this Court allowed interest. The Robertson case, however, is distinguishable from the present case. The Circuit Court of Appeals in the Robertson case (286 Fed. 503) allowed interest on the theory that an agent of the enemy debtor was present in this country during the war with funds out of which interest could have been paid. This Court affirmed the Circuit Court of Appeals decision in the matter.

The propriety of allowing interest upon an indebtedness owing by an enemy for the period of the war where an agent is present in the country with funds in his possession with which to pay the interest, is based on the decision of this Court in the case of *New York Life Insurance Co.* v. *Davis,* 95 U. S. 425. In the present case,

however, there is no evidence, and it is apparently not a fact that the enemy debtor had an agent in this country of any kind. The rule, therefore, laid down by this Court in the Robertson case is inapplicable to the present case.

III

The treaty of peace between the United States and Germany signed on August 25, 1921, has no application to the questions involved in this case

The Treaty of Peace between the United States and Germany signed August 25, 1921, and proclaimed on November 14, 1921 (42 Stat. L. 1939), incorporated certain provisions of the Treaty of Versailles (Senate Document No. 85, 66th Congress, First Session). Amongst other provisions of the Treaty of Versailles thus incorporated was Part X. (The Appendix hereto contains Article 243 of Part VIII and Sections III and IV of Part X of the Treaty of Versailles. These portions of the Treaty of Versailles contain all the provisions which might in any way be relevant to the discussion in this case.)

It is conceded that in so far as applicable to the questions here involved the provisions of the Treaty of Versailles incorporated in the Treaty of Peace between the United States and Germany are binding upon this Court and are part of the supreme law of the land.

It is the contention of the plaintiffs that paragraph 14 of the Annex to Section IV of Part X

makes provision for the rate of exchange and the rate of interest which is to be used with respect to claims such as the plaintiffs' in this case. Paragraph 14 of the Annex to Section IV of Part X is as follows:

> The provisions of Article 297 and this Annex relating to property, rights, and interests in an enemy country, and the proceeds of the liquidation thereof, apply to debts, credits, and accounts, Section III regulating only the method of payment.
>
> In the settlement of matters provided for in Article 297 between Germany and the Allied or Associated States, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt Section III, and between their respective nationals, the provisions of Section III respecting the currency in which payment is to be made, and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Germany that the said provisions are not to be applied.

The specific provisions as to rate of exchange in the Treaty of Versailles are to be found in Subdivision (d) of Article 296, which is part of Section III. This is as follows:

> Debts shall be paid or credited in the currency of such one of the Allied and

Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion, or India, at the pre-war rate of exchange.

For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Germany.

If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

In the case of new States the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in Part VIII (Reparation).

Article 296, however, makes provision for the settlement of debts payable before the war and due by a national of one of the contracting powers residing within its territory to a national of an opposing power residing within its territory. The provision made for the payment and collection of

such debts was the establishment of a clearing house. The rate of exchange provided was the rate to be used in the settlement of debts in such a clearing house. It was further provided in Article 296 that the provisions of the Article did not apply as between Germany on the one hand and any of the Allied and Associated Powers unless within a period of one month from the deposit of the ratification of the present treaty notice to that effect is given to Germany by the Government of the power adopting the provisions. No notice was ever given to Germany by the United States that the United States adopted the provisions of Article 296, hence the provisions of Article 296 do not apply to the United States, and no debts existing between nationals of the United States and nationals of Germany are settled by the clearing house. *The very fact that this suit is brought under Section 9 of the Trading with the Enemy Act to collect this debt is conclusive of that, since paragraph 3 of the Annex to Article 296 makes provision that the parties to the clearing-house arrangement will prohibit within their territory all legal process relating to the payment of enemy debts except in accordance with the provisions of the Annex.*

Plaintiffs in this case do not contend that Article 296 is binding upon the United States. They do say, however, that paragraph 14 of the Annex to Section IV of Part X makes provision as to

the rate of exchange to be used and interest to be allowed upon claims other than those provided for in the clearing-house arrangement. Claimants, however, fail to note the specific references in paragraph 14. That Subdivision says:

> The provisions of Article 297 and this Annex relating to property, rights, and interest in an enemy country and the proceeds of the liquidation thereof apply to debts, credits, and accounts, Section III regulating only the method of payment.

Reference to Article 297 (see Appendix) will show that that section had no reference whatsoever to the payment of debts of a German due an American citizen. Article 297 is a part of Section IV, which is headed "Property, Rights, and Interests." Section 297 provides entirely for the dealing with and liquidation of property belonging to nationals of the Allied and Associated Powers, which property was in Germany during the war, or property of Germans which was within the territory of the Allied and Associated Powers during the war. It is perfectly true that paragraph 14 of the Annex to Section IV includes debts, credits, and accounts, but that is a provision that Article 297, which does not deal with payment of debts as between nationals of the various powers, shall include within its scope not only tangible property within the various countries but also intangible. For instance, it means that the provisions of Article 297 shall permit

the liquidation and dealing with the credits of Germans within the United States during the war or held by the United States during the war under the provisions of Subdivision (b) of Article 297. Credits are made property within the meaning of Article 297.

Further, paragraph 14 provides that in the matters provided for in Article 297 between Germany and the Associated States and between their respective nationals the provisions of Section III respecting the currency in which payment is to be made and the rate of exchange and interest shall apply unless the Governments of the Allied or Associated Powers concerned shall within six months of the coming into force of the present treaty notify Germany that said provisions are not to be applied. Paragraph 14 simply provides that in the settlement of matters provided for in Article 297 the provisions as to the rate of exchange and interest provided for in Section III shall apply. It must, therefore, be ascertained what the matters provided for in Article 297 are. Article 297 is set forth in full in the Appendix hereto, and it will not be necessary to go into all the provisions thereof. Attention, however, is called to the fact that Subdivision (b) of Article 297 provides for the liquidation by the Allied and Associated Powers of all property, rights, and interests belonging, at the date of the coming into force of the present treaty, the German nationals or companies controlled by them within the territories of the

Allied and Associated Powers. Here, then, is one place where the provisions as to the rate of exchange and interest provided for in Section III and made applicable to Article 297 by paragraph 14 of the Annex to Section IV apply, viz, in the liquidation of properties of Germans within the United States. Subdivision (e) of Article 297 provides that the nationals of the Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted on their property, rights, or interests, including any company or association in which they are interested in German territory as it existed on August 1, 1914. Here is another place where the rate of exchange and interest provisions apply, viz, when Germany liquidates the property of American nationals, which property was in Germany as of August 1, 1914, Germany must use the rate of exchange and rate of interest provided for in Section III. And so all the provisions of Article 297 might be discussed to show that Subdivision 14 of the Annex to Section IV has no application whatsoever to a suit under Section 9 of the Trading with the Enemy Act where the object of the suit is to collect a debt owing to an American citizen out of the property of an enemy in the United States which has been seized by the Alien Property Custodian. Such a procedure does not approach, nor is it similar in any way to, anything provided for in Article 297 of the Treaty of Versailles.

The further contention is made that Subdivision (2) of Section (h) of Article 297 also makes provision for cases such as the present. Subdivision (2) of Section (h) of Article 297 provides:

> As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights, and interests, and the cash assets, of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights, and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal of such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. Any property, rights, and interests or proceeds thereof or cash assets not used as above provided may be retained by the said Allied or Associated Power, and if retained the cash value thereof shall be dealt with as provided in Article 243.
>
> In the case of liquidations effected in new States, which are signatories of the present Treaty as Allied and Associated Powers, or in States which are not entitled to share in the reparation payments to be made by Germany, the proceeds of liquidations effected by such States shall, subject to the rights of the Reparation Commission

> under the Present Treaty, particularly under Articles 235 and 260, be paid direct to the owner. If, on the application of that owner, the Mixed Arbitral Tribunal provided for by Section VI of this Part, or an arbitrator appointed by that Tribunal, is satisfied that the conditions of the sale or measures taken by the Government of the State in question outside its general legislation were unfairly prejudicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by that State.

Paragraph 4 of the Annex to Article 297 is as follows:

> All property, rights, and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation, or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights, and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war.

The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights, and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

The United States not having adopted the provisions of Section III and the Annex thereto the question is whether or not these provisions affect a suit under Section 9 of the Trading with the Enemy Act. It will be noted that Subdivision (2) of Subsection (h) of Article 297 provides that the proceeds of the property, rights, and interests, and the cash assets of German nationals received by an Allied or Associated Power, shall be subject to disposal by such Power in accordance with its laws and regulations, and *may* be applied in payment of the claims and debts defined by Article 297 and paragraph 4 of the Annex thereto.

In the first place, it is to be noted that these words are permissive. For the United States to take advantage of such provisions it would be necessary for it to pass legislation. The plain-

tiffs contend that the words in this subdivision provide that property of German nationals may be applied in payment of claims and debts as defined in paragraph 4 of the Annex to Article 297, and include a claim such as theirs under Section 9 of the Trading with the Enemy Act.

Reference to paragraph 4 of the Annex will show that provision is there made that all property, rights, and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation, or other dealings therewith *may* be charged by that Allied or Associated Power, in the first place, with the payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights, and interests, or debts owing to them by German nationals, and the payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914. Here again permission is given to make use of enemy property in the manner specified.

The paragraph continues, however, to state that the amount of such claims—that is to say, claims of the nationals of the Allied or Associated Power—may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an

arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI.

It is contemplated by this provision that where the property of Germans is applied to the payment of debts of the nationals of an Allied or Associated Power, those debts must be assessed either by an arbitrator appointed by Mr. Gustave Ador, or by him, or by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI of the Treaty of Versailles. This clearly has no reference to suits under Section 9 of the Trading with the Enemy Act in a Court of the United States.

Going back to Subdivision (2) of Subsection (h) of Article 297 it will be noted that it is further provided that any property, rights, and interests or proceeds thereof, or cash assets not used as above provided, may be retained by the said Allied or Associated Power, and if retained the cash value thereof shall be dealt with as provided in Article 243. Reference to Article 243 will still more clearly indicate that these provisions of the Treaty have no application to a suit under Section 9 of the Trading with the Enemy Act. Article 243 is as follows:

> The following shall be reckoned as credits to Germany in respect of her reparation obligations:
>
> (*a*) Any final balance in favor of Germany under Section V (Alsace-Lorraine) of Part III (Political Clauses for Europe)

and Sections III and IV of Part X (Economic Clauses) of the present treaty.

(*b*) Amounts due to Germany in respect of transfers under Section IV (Saar Basin) of Part III (Political Clauses for Europe), Part IX (Financial Clauses), and Part XII (Ports, Waterways, and Railways).

(*c*) Amounts which, in the judgment of the Reparation Commission, should be credited to Germany on account of other transfers under the present Treaty of property, rights, concessions, or other interests.

In no case, however, shall credit be given for property restored in accordance with Article 238 of the present Part.

No one will contend that any provision has been made by the United States for the final disposition of enemy property. It is, therefore, respectfully submitted that none of the provisions of the Treaty of Versailles, incorporated in the Treaty between the United States and Germany, has any bearing upon the present case.

CONCLUSION

The decree of the District Court, in so far as it permitted plaintiffs to recover the amount of their debt in marks in United States money at the rate of exchange prevailing at the date the debt was due, should be reversed and the portion of the decree of the lower Court refusing to allow the plaintiffs to recover interest upon their debt dur-

ing the period between April 6, 1917, and July 14, 1919, should be affirmed.

Respectfully submitted.

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Solicitors for Frederick C. Hicks, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

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